Supreme Court, U.S.
FILED
JUN 2 3 2006
OFFICE OF THE CLERK

(6)

No. 05-998

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: Feb. 8, 2006
CERTIORARI GRANTED: Apr. 17, 2006

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-10302

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUAN RESENDIZ-PONCE, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
9/2/04	Filed original and 15 copies Appellant Juan Resendiz-Pounce opening brief (Informal: n) 23 pages and five excerpts of record in 1volumes; served on 8/25/04 [04-10302] (ft)
1/31/05	Filed original and 15 copies of appellee USA's 21 pages brief and 5 supplemental excerpts of record in 1 volume; served on 1/28/05 [04-10302] (ba)
	* * * * *
6/14/05	ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Thomas M. Reavley, Johnnie B. RAWLINSON [04-10302] (lb)
	* * * * *
10/11/05	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after

DATE	PROCEEDINGS
	Oral Hearing; Reversed; Written, Signed, Published. Alfred T. GOODWIN, author; Thomas M. Reavley, concurring; Johnnie B. RAWLINSON.) FILED AND ENTERED JUDGMENT. [04-10302] (ba)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Criminal Docket No. 2:03-cr-00810-EHC-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
07/30/2003	11	INDICTMENT by USA attorney Mary Beth Phillips. Counts filed against Juan Resendiz-Ponce (1) count(s) 1 (former emp) (Entered: 07/31/2003)
		* * * * *
11/04/2003	25	MOTION to dismiss indictment [25-1] by Juan Resendiz-Ponce (former emp) (Entered: 11/04/2003)
		* * * * *
11/17/2003	28	RESPONSE by pla to motion to dismiss indictment [25-1] by Juan Resendiz-Ponce (former emp) (Entered: 11/19/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/24/2003	33	(FILED: 11/25/03) MINUTES: before Judge Earl H. Carroll . Ct Rptr: Candy Potter Interpreter: Louis Velasco/Spanish. mtn hrg held; denying motion to strike (B)(2) allegation [26-1] by Juan Resendiz-Ponce, taking under advisement on 11/24/03 the motion to dismiss indictment [25-1] by Juan Resendiz-Ponce as to question of if dft was lawfully deported; denied w/respect to identifying something as an overt act per se and as to specific intent re indictment [33-1]; ORD proposed jury instructions be filed by 11/28/03 at 4:00 PM; trial date of 12/2/03 is affirmed (former emp) Modified on 12/01/2003 (Entered: 12/01/2003)
11/26/2003	34	JURY instructions by dft Juan Resendiz-Ponce as to dft Juan Resendiz-Ponce (former emp) (Entered: 12/02/2003)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/02/2003	37	(FILED: 12/2/03) MINUTES: before Judge Earl H. Carroll. Ct Rptr: Candy Potter Interpreter: VanDuzer/Sporrer/ Spanish. DAY 1 JURY TRIAL if not previously denied, denying motion to strike (B)(2) allegation [26-1] by Juan Resendiz-Ponce; ORD filing Henthorn rpt from gov under seal; trial begins, voir dire begins as to Juan Resendiz-Ponce, jury impaneled Juan Resendiz-Ponce (1) count(s) 1; opening stmts; gov directed to file their case law by 4:30 tonight; contd to 9:00 AM 12/3/03 [37-4] (former emp) (Entered: 12/04/2003)
		* * * * *
12/03/2003	40	(FILED: 12/5/03) MINUTES: before Judge Earl H. Carroll . Ct Rptr: Candy Potter Interpreter: Lita VanDuzer/ Spanish. DAY 2 JURY TRIAL ORD denying dft obj to admission of exh 7 absence of jury; gov rests; dft oral mtn for jgm of acquittal purs to rule 29 argued and denied absence of

DATE	DOCKET NUMBER	PROCEEDINGS
		jury; defense rests; closing arguments; jury deliberates and returns verdict; Juan Resendiz-Ponce (1) count(s) 1 found guilty,; sentencing set for 2:00 2/23/04 for Juan Resendiz-Ponce [40-3] (former emp) (Entered: 12/05/2003)
		* * * * *
12/03/2003	46	Court's given JURY instructions as to dft Juan Resendiz-Ponce (former emp) (Entered: 12/05/2003)
		* * * * *
05/24/2004	60	(FILED: 5/24/04) MINUTES: before Judge Earl H. Carroll . Ct Rptr: Candy Potter Interpreter: Cristina Sporrer/ Spanish.; sentencing held as to Juan Resendiz-Ponce [60-2] (LCF) (Entered: 05/25/2004)
05/24/2004	61	JUDGMENT and Commitment issued as to Juan Resendiz-Ponce, sentencing for Juan Resendiz-Ponce (1) count(s) 1. Committed to BOP for a term of SIXTY THREE (63) MOS, followed by supervised release

DATE	DOCKET NUMBER	PROCEEDINGS
		for a term of THIRTY SIX (36) MOS; Court recommends that the dft be placed in an institution in the southwestern part of the United States where there are education programs and vocational training available for his participation; S/A: $100, Case closed ; ordered by Judge Earl H. Carroll (LCF) (Entered: 05/25/2004)
05/26/2004	62	NOTICE OF APPEAL by dft Juan Resendiz-Ponce from District Court judgment, re: conviction and sentence (cc: 9CCA/ EHC/pts/BAS/USAO/dfns and 1 copy for dft) (REW) (Entered: 05/26/2004)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-810-PHX EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, AKA: JUAN PONCE RESENDIZ,
DEFENDANT

[Filed: July 30, 2003]

INDICTMENT

VIO: 8 U.S.C. §§ 1326(a) and enhanced by (b)(2)
(Attempted Reentry After Deportation)

THE GRAND JURY CHARGES:

On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

A TRUE BILL

/s/ JOHN T. ZIEGHER
JOHN T. ZIEGHER
Foreperson of the grand jury
Date: July 30, 2003

PAUL K. CHARLTON
United States Attorney
District of Arizona

/s/ [ILLEGIBLE]
MARY BETH PHILLIPS
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-00810 PHX EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, DEFENDANT

[Filed: Nov. 4, 2003]

DEFENDANT'S MOTION TO DISMISS INDICTMENT

THE INDICTMENT IS DEFECTIVE BECAUSE IT DOES NOT ALLEGE OR STATE ANY FACTS CONCERNING THE OVERT ACT NECESSARY FOR THE "ATTEMPT" PRONG OF § 1326.

Pursuant to Rule 12(b)(2) defendant moves to dismiss the indictment due to insufficiency of allegation. Under Rule 7(c), which pertains to the nature and content of an Indictment, the requirement is that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged". This motion is timely because "a claim of defective indictment can be raised at any time" although the standard of review will vary. *United States v. James*, 980 F.2d 1310, 1314 (9th Cir. 1992). A pretrial challenge to an indictment is both timely and proper. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2000).

The most authoritative decision on the attempt aspect of § 1326 is the En Banc decision in *United States v. Gracidias-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000). It ruled that Congress intended to incorporate the common law meaning of "attempt" into § 1326. It ruled:

> . . . we hold the elements of the crime of attempted illegal reentry into the United States under 8 U.S.C. § 1326 are: (1) the defendant had the purpose, i.e. conscious desire, to reenter the United States without the express consent of the Attorney General; (2) *that the defendant committed an overt act that was a substantial step toward reentering without that consent.* . . . .

(231 F.3d at 1196). (Emphasis supplied).

Then, in *United States v. Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) the circuit ruled that an indictment which failed to include essential facts regarding the element of the required mental state, which is specific intent, was defective. There, the timely filed pretrial motion argued: "the indictment failed to allege the specific intent required in 'attempt' crimes." (252 F.3d at 1032). The ruling was:

> An indictment's failure to "recite an essential element of the charged offense is not a minor or technical flaw . . . but a fatal flaw requiring dismissal of the indictment." *United States v. DuBo*, 186 F.3d 1177, 1179 (9th Cir. 1999). . . . The district court should dismiss the indictment on remand.

(252 F.3d at 1032).

The element of an overt act in furtherance of the attempted illegal reentry is just as much an element of the offense as is the mental state and needs to be

included in the indictment together with the specific intent.

Also, in *United States v. Leos-Maldonado*, 302 F.3d 1061 (9th Cir. 2000) a defective indictment argument was presented late in the appellate process pointing out that an element was not alleged in the indictment. The court ruled the omission to be a "fatal flaw requiring dismissal" and said:

> . . . we might have been persuaded to set aside Leos' conviction had he timely raised a challenge to the indictment in the district court . . .

(302 F.3d at 1064).

See also *United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987) which holds that an essential element of the crime of attempt is an overt act.

THEREFORE, the indictment is defective and must be dismissed for failure to allege an essential element, an overt act, or to state the essential facts of such overt act.

DATED: October 30, 2003.

/s/ ATMORE L. BAGGOT
ATMORE L. BAGGOT
Attorney For Defendant JUAN RESENDIZ-PONCE

Copy delivered on
November 4, 2003,
to office of:

Ms. Raynette Logan, Esq.
Assistant U.S. Attorney, 12th Fl.

/s/ ATMORE L. BAGGOT
ATMORE L. BAGGOT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, AKA; JUAN PONCE RESENDIZ, DEFENDANT

[Filed: Nov. 17, 2003]

GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT

The United States of America, by and through undersigned counsel, hereby responds to defendant's motion to dismiss the indictment. In support of this response, the government provides the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

An indictment must allege the elements of the offense charged and the facts which inform the defendant of the specific offense with which he is charged. *Pernillo-Fuentes*, 252 F.3d 1030, 1031 (9th Cir. 2001). In constructing the language of the indictment courts must be guided by common sense and practicality. *United States v. Christopher*, 700 F.2d 1253 (9th Cir. 1983). Attempted entry in violation of 8 U.S.C. 1326 essentially requires two elements: (1) the specific intent to reenter without consent; and (2) an overt act

that was a substantial step towards reentry. *United States v. Leos-Maldonado*, 302 F.3d 1061 (9th Cir. 2002).

The defendant relies on *United States v. Gracidias-Ulibarry*, in his argument that the indictment failed to allege specific intent since it stated that he "knowingly and intentionally" attempted to enter the United States, 231 F.3d 1188, 1196 (9th Cir. 2000). In *Gracidias-Ulibarry*, the Court found constitutional error when the district court failed to instruct the jury on the specific intent element of reeentry. *Id.* at 1198. There, the trial court instructed the jury that it should convict Gracidias if it merely found that he "attempted to reenter the United States" instead of finding that he "intended" to enter the United States. *Id.* at 1191. The defendant also relies on *Pernillo-Fuentes* which held that an indictment that alleged only that the defendant "attempted to enter the United States" was fatally flawed. 252 F.3d at 1032. The facts of these cases are distinguishable from the instant case. Here, in contrast to mere attempt, the indictment alleges that the defendant "knowingly and intentionally" attempted to enter the United States.

Furthermore the indictment does allege the specific intent required in *Gracidias-Ulibarry*. The terms knowingly and intentionally constitute willfulness. *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997). "Willful" in the criminal context includes a specific intent to do an act forbidden by law. *United States v. Drew*, 722 F.2d 551 (9th Cir. 1983). In this case, the indictment states that the defendant "knowingly and intentionally" attempted to enter the United States and thus specific intent is alleged.

The defendant also alleges that the indictment failed to allege an overt act. Attempted reentry is not an attempt to commit an independently described offense, in the sense in which the word "attempt" is ordinarily used in criminal law, but it is the actual reentry into the United States. *United States v. Corrales-Beltran*, 192 F.3d 1311, 1319 (9th Cir. 1999). Attempted entry occurs when a previously deported alien makes an effort or tries to reenter the United States. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002). It is the act of crossing the boundary line into the United States. *Id.* In this case, the indictment alleges that the defendant attempted to enter the United States at or near San Luis, Arizona on or about October 15, 2002. Since the overt act of an attempted entry crime is the entry itself and the indictment stated the date and place of the defendant's reentry, the indictment sufficiently alleges an overt act.

Conclusion

For the foregoing reasons the defendant's motion to dismiss the indictment should be denied.

Respectfully submitted this 17th day of November, 2003.

PAUL K. CHARLTON
United States Attorney
District of Arizona

/s/ RAYNETTE M. LOGAN
RAYNETTE M. LOGAN
Assistant U.S. Attorney

Original filed and copy of the foregoing mailed this 17th day of November 2003, to:

Atmore L. Baggot
1615 N. Delaware Drive
Apache Junction, Arizona 85220-1804

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-810 PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, DEFENDANT

Nov. 24, 2003
2:55 p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

BEFORE: THE HONORABLE EARL H. CARROLL, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

U.S. ATTORNEY'S OFFICE
BY: RAYNETTE LOGAN, ESQ.
40 North Central Avenue
Suite 1200
Phoenix, Arizona 85004

FOR THE DEFENDANT:

ATTORNEY AT LAW
BY: ATMORE L. BAGGOT, ESQ.
1615 North Delaware Drive
Apache Junction, Arizona 85220
Phoenix, Arizona 85004

* * * * *

[2]

THE CLERK: Criminal 2003-810, United States of America versus Juan Resendiz-Ponce, on or defendant's motion to strike (b)(2) allegation and to dismiss Indictment.

MS. LOGAN: Good afternoon, Your Honor, Raynette Logan for the United States.

MR. BAGGOT: And Atmore Baggot for the defendant, who is also present.

THE COURT: All right. We have the motion to dismiss, your contention being that there have to be some overt acts alleged for the attempt, Mr. Baggot?

MR. BAGGOT: Yes, sir, that's the motion.

THE COURT: Right.

MR. BAGGOT: In the Pernillo case the Court of appeals dismissed a jury verdict, trial which had gone to a jury, because the defendant had timely protested about the adequacy of the allegation of the Indictment. Their ruling there, of course, had to do with the element of specific intent, the defendant's mental state. This motion is a logical extension of that argument.

The other element of an attempt is that the defendant must actually do something, they can't just talk, they must actually commit an overt act. We are entitled to know what that overt act—

THE COURT: What it is alleged—what is the act alleged in the Indictment?

[3]

MR. BAGGOT: There isn't any. There isn't any, that's our problem.

THE COURT: Do they allege that he attempted to reenter the United States?

MR. BAGGOT: That is the crime. But what is the overt act?

THE COURT: Was he in the United States when he was arrested?

MR. BAGGOT: Not legally, no, sir.

THE COURT: Well, he was in the United States.

MR. BAGGOT: Not under Pacheco Medina. He was under the control of the Immigration agency.

THE COURT: Well, for purposes of attempt—

MR. BAGGOT: Physically he had crossed the border, yes.

THE COURT: He was in the United States.

MR. BAGGOT: At the turnstile.

THE COURT: Okay. All right. Well, I have read the case Gracidas-Ulibarry. And I have not found any case, Mr.—and then I'll ask the government, but Mr. Baggot, where there was reference to a particular overt act, and that there was no overt act alleged, and therefore an Indictment—a case was dismissed.

As a matter of fact, the ones that have discussed that particularly say there was no overt act alleged.

[4]

MR. BAGGOT: But still, that's an element of the offense and it has to be alleged.

THE COURT: I see. Notwithstanding what the Ninth Circuit has said in a number of cases where they found that beyond the attempt and being in the United States, that there was any overt act required?

MR. BAGGOT: But he wasn't in the United States legally, he's under Pacheco Medina.

THE COURT: I see. Well, in any event, Miss Logan.

MR. BAGGOT: Yes, Your Honor.

The overt act is the attempt to enter in this case. The allegation of attempted entry is the actual act of attempting to enter the United States. And by allowing—by alleging the time and the place of the Indictment, it gives enough specificity to the defense to be able to challenge the Indictment.

So in an attempted illegal reentry, the actual attempt to enter is the overt act itself in these cases.

THE COURT: Well, I think it's Gracidas-Ulibarry that has five elements that are supposed to be alleged. And I have not found any case dealing with an overt act that wasn't alleged or some specific event.

MR. BAGGOT: Rule 7 says there have to be allegations of fact, not just conclusions of law, but facts alleged. Tell us what it is.

[5]

THE COURT: Have you raised this proposition in other district courts here in the District of Arizona?

MR. BAGGOT: Well, sir, I had a pro se defendant who tried to argue it to a jury, that's where this argument came from.

THE COURT: Well—

MR. BAGGOT: That was a problem.

THE COURT: Yes. Well, I find, Mr. Baggot, that the Indictment alleges a reentry—attempted reentry. That the defendant was in the United States, had entered the United States albeit illegally. And that being here is sufficient to advise him and you as his lawyer of what it is he's charged with. And the Indictment is not any mystery or concealed from him specifically what he is charged with.

So the motion is denied with respect to identifying something as an overt act per se.

You have another argument?

MR. BAGGOT: Yes sir. Our second motion is to strike the (b)(2) allegation in the Indictment. The fact of whether a deportation preceded or was subsequent to a criminal conviction is something that does not appear on the fact of the conviction. It's the temporal sequence—

THE COURT: Doesn't appear on the face of the conviction. What conviction?

MR. BAGGOT: They're alleging a (b)(2). That means [6] that he was deported subsequent to an aggravated felony. But the subsequent to is a matter of fact.

THE COURT: Pardon me. The Indictment alleges that he was—previously entered and was deported October 15, 2002; right?

MR. BAGGOT: Right.

THE COURT: Okay. Now what else do you want?

MR. BAGGOT: There are no facts which the Government can prove to the jury that the deportation was subsequent to a conviction for an aggravated felony so as to put this under paragraph (b)(2). That's a fact that doesn't appear—

THE COURT: Has the Ninth Circuit addressed that argument particularly and rejected it?

MR. BAGGOT: You have.

THE COURT: They specifically rejected it; right?

MR. BAGGOT: You did, yes.

THE COURT: No, the Ninth Circuit in a published opinion.

MR. BAGGOT: What opinion was that? I'm not aware that they've ever considered this argument.

THE COURT: How about Pacheco Zepeda?

MR. BAGGOT: That's an Almendarez argument.

THE COURT: Right.

MR. BAGGOT: Almendarez is the law of the circuit, we understand that. But the fact of the time sequence, whether [7] the conviction was subsequent to or preceded deportation is nowhere on the fact of the State Court conviction.

THE COURT: Well, I think the rule in Pacheco Zepeda is controlling, and cites Almendarez, that illegal entry following deportation need not be treated as an

element of the offense that must be charged in the Indictment and proved beyond a reasonable doubt.

MR. BAGGOT: That's limited to the conviction.

THE COURT: So in any event, your motion there is denied. Any others?

MR. BAGGOT: Not at the moment.

THE COURT: Well, let's see here. I thought I had a third one.

MR. BAGGOT: Well, you have a motion in limine by the Government, which I request more time to respond to.

THE COURT: No, you had one, didn't you, about specific intent?

MR. BAGGOT: Regarding the Indictment, Rule 7 states that essential facts must be alleged. And we don't have any essential facts.

THE COURT: Well, didn't you claim—didn't you argue particularly that specific intent had to be alleged in the Indictment?

MR. BAGGOT: Well, I said there has to be essential facts under Rule 7. There's no facts.

[8]

THE COURT: Well, is specific intent what you were talking about? I thought it was.

MR. BAGGOT: Yes, but what are the facts of the specific intent? Thee are not specific facts, just the legal conclusion that he entered intentionally, that's alleged.

THE COURT: What should they say?

MR. BAGGOT: The facts.

THE COURT: What fact?

MR. BAGGOT: Whatever he did.

THE COURT: What fact? It says the fact is that he entered intentionally. That is a fact.

MR. BAGGOT: Well, it's a legal conclusion.

THE COURT: All right. That motion is denied as well.

Now the Government has a motion to strike —what's the Government's motion?

MS. LOGAN: Your Honor, the Government's—

THE COURT: And I would say incidentally too, that the Indictment in this case, unlike the Indictment in—you're familiar with Pernillo-Fuentes?

MR. BAGGOT: Pernillo?

THE COURT: Pernillo.

MR. BAGGOT: That's the one that was dismissed because it didn't allege a specific intent.

THE COURT: Right. And there all the Indictment said [9] was he attempted to enter, and it didn't say intentionally.

MR. BAGGOT: Right. But it didn't raise the issue of the overt act.

THE COURT: We're now talking about specific intent and alleging that rather than some overt act.

In any event, I think Pernillo-Fuentes was a different fact situation. The Indictment in that case simply said attempting to enter. It didn't express the nature of the intention, that it had to be intentionally. They don't use the words "specific intent" in any place, et cetera.

And so that motion is denied as well, that part of your motion.

Now, that leaves us with the Government's motion?

MS. LOGAN: Yes. The Government requests that this Court preclude the defense from arguing to the jury the lawfulness of the deportation. If the defense is going to argue that, they have to argue it to the Court to decide whether or not that prior deportation was lawful.

THE COURT: And are you intending to do that, Mr. Baggot?

MR. BAGGOT: Well, Your Honor, we're not going to argue about the lawfulness of it, that would have to be to the Court. But still, the fact of the deportation is a matter of fact.

* * * * *

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA CRIMINAL
MINUTES-MOTIONS

CR-03-810-PHX-EHC DATE: 11/24/03
Case Number

Hon: Earl H. Carroll Judge # 7014

USA v. Resendiz-Ponce, Juan
Last Name First Name Middle Name

DEFENDANT:
X Present __ Not Present __ Released X Custody _ Writ

Deputy Clerk:
Roberta Hightower Crt Rptr/ECR: Candy Potter

U.S. Atty:
Raynette Logan Dft Atty: Atmore Baggot, appointed

Intrptr: Louis Velasco Language: Spanish

___ Dft not appearing, on mot of US Atty, order bond revoked/forfeited and B/W issued.

PROCEEDINGS: X Open Court ___ Chambers ___ Other

03:05 Hearing held on the Dft's Motion to Dismiss Indictment [25-1] and to Strike (b)(2) allegation [26-1]. Argument heard,

IT IS ORDERED denying the motion to dismiss indictment with respect to identifying something as an overt act per se. As to specific intent regarding the Indictment, that motion is denied as well. As to the question of if the defendant was lawfully deported, the issue is taken under advisement.

IT IS FURTHER ORDERED denying the Motion to Strike (b)(2) allegation [86-1].

IT IS FURTHER ORDERED any proposed jury instructions shall be filed by Friday, 11/28/03 at 4:00p.m. The Court will

fax proposed panel questionnaire tomorrow, 11/25/03. The trial date of 12/2/03 is affirmed.

Any plea proceeding must be scheduled with the court prior to 4:00 p.m., Monday 12/1/03.

Excludable delay purs to 18:3161 _____ to commence on ___ _____ and terminate on _____

Copies to:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-810 PHX EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, DEFENDANT

Filed: Dec. 2, 2003
8:59 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
VOLUME 1

BEFORE: THE HONORABLE EARL H. CARROLL,
JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

U.S. ATTORNEY'S OFFICE
BY: RAYNETTE LOGAN, ESQ.
40 North Central Avenue
Suite 1200
Phoenix, Arizona 85004

FOR THE DEFENDANT:

ATTORNEY AT LAW
BY: ATMORE L. BAGGOT, ESQ.
1615 North Delaware Drive
Apache Junction, Arizona 85220

* * * * *

[91]

MS. LOGAN: The Government calls Nancy Vela. Agent Vela, will you please approach the witness stand?

THE CLERK: Please raise your right hand.

(NANCY VELA, GOVERNMENT WITNESS, SWORN)

THE CLERK: Would you please state your legal name for the record and spell your last name?

THE WITNESS: Nanny Elena Vela, V-E-L-A.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Agent Vela, where do you work?

A. At the San Luis, Arizona port of entry.

Q. And who do you work for?

A. The Immigration and Naturalization Service.

Q. And what are some of your duties there?

A. I inspect the people that are coming from a foreign country.

Q. And how long have you worked there?

A. Approximately about three years.

Q. And are you a Spanish speaker?

A. Yes.

Q. Are you fluent?

A. Yes.

Q. Did you encounter the defendant on June 1st of 2003?

[92]

A. Yes.

Q. And what was your first contact with the defendant?

A. He was coming through the pedestrian area.

Q. And what was he attempting to do?

A. He was trying to—

MR. BAGGOT: Objection, Your Honor, calls for a legal conclusion.

THE COURT: Describe the association of the area, and let's proceed.

Q. BY MS. LOGAN: Can you describe the area that you were working in?

A. Yes. There's an entrance to the United States where people who are not in a vehicle come across walking. And there is a turnstile before you come into the United States. And that's where I met the subject.

Q. And what were your duties at the turnstile?

A. Inspect the people coming from a foreign country.

Q. And what happened when the defendant approached you?

A. He presented a resident alien card.

Q. And who was the resident alien card for?

A. It was for Antonio Resendiz.

Q. And did the photo resemble the defendant?

A. No.

Q. Did you ask for another form of identification?

A. Yes.

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Q. And did he present another form of identification?

A. Yes.

Q. And what was that?

A. An Arizona driver's license.

Q. And what was the name on the driver's license?

A. Antonio Resendiz.

Q. And did that photograph look like the defendant?

A. No.

Q. And what happened next?

A. I proceeded to ask him where he was going. And he stated that he wanted to go to Calexico.

Q. And is Calexico in the United States?

A. Yes.

Q. Approximately how far from San Luis is Calexico?

A. I want to say about an hour.

Q. And what happened next?

A. I proceeded to refer him to the INS secondary office.

Q. And at the point where you're at the turnstile and the defendant approached you, is that on U.S. property?

A. Yes.

Q. About how far did the defendant have to walk on U.S. property to get to that turnstile?

A. Approximately about 100 feet.

MS. LOGAN: Could the witness have Exhibits 1 and 2?

Q. BY MS. LOGAN: Can you look at Exhibit 1, please? Do you [94] recognize that?

A. Yes.

Q. What is it?

A. It's a permanent resident card.

Q. And how do you recognize it?

A. The subject presented this at the time of applying for admission.

Q. And what is the name on that card?

A. Antonio Resendiz.

Q. And is that in substantially the same condition as when you took it from the defendant?

A. Yes.

MS. LOGAN: Your Honor, the Government moves to introduce Exhibit 1.

MR. BAGGOT: Exhibit 1 is admitted.

THE COURT: Exhibit 1 is admitted.

Q. BY MS. LOGAN: Could you look at Exhibit 2, please?

A. Yes.

Q. Do you recognize that exhibit?

A. Yes.

Q. And what is it?

A. It's an Arizona driver's license.

Q. And how do you recognize it?

A. After the subject presented the resident alien card I asked him for another I.D. and he presented the Arizona [95] driver's license.

Q. And what is the name on that driver's license?

A. Antonio Resendiz.

Q. And is it in substantially the same condition as when you seized it from the defendant?

A. Yes.

MS. LOGAN: Your Honor, the Government moves to admit Exhibit 2.

MR. BAGGOT: No objection.

THE COURT: Exhibit 2 is admitted.

Q. BY MS. LOGAN: Will you place Exhibit 1 back in the bag? And is the person who presented those two forms of identification to you here today in the courtroom?

A. Yes.

Q. And can you identify him, please?

A. Yes. He's sitting next to—he's wearing a green shirt with the orange on the front.

MS. LOGAN: Thank you.

No further questions, Your Honor.

THE COURT: Mr. Baggot.

CROSS-EXAMINATION

BY MR. BAGGOT:

Q. Agent Vela, you stated that you first encountered the defendant at the turnstile; is that correct?

A. Yes.

* * * * *

[100] that you had contact with the defendant?

A. Yes.

Q. So would you say that what you wrote in that memo is probably more accurate than what you remember today?

A. Yes.

Q. And also Calexico, is that in the United States?

A. Yes.

Q. And the two forms of identification that the defendant presented to you, they did not have the defendant's photograph on them, did they?

A. No.

MS. LOGAN: Thank you. No further questions, Your Honor.

THE COURT: You may step down. Thank you very much.

Next witness.

MS. LOGAN: Your Honor, the Government calls Sean Bly.

Agent Bly, will you please approach the witness stand?

THE CLERK: Please raise your right hand.

(SEAN BLY, GOVERNMENT WITNESS, SWORN)

THE CLERK: Would you please state your name for the record and spell your last name?

THE WITNESS: Sean Richard, B-L-Y.

THE CLERK: Thank you. Please be seated.

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DIRECT EXAMINATION

BY MS. LOGAN:

Q. Agent Bly, where do you work?

A. San Luis port of entry.

Q. And who do you work for?

A. I work for the Customs and Border Protection.

Q. And how long have you worked for them?

A. For seven-and-a-half years.

Q. And what are some of your duties there?

A. I enforce the laws of the INA.

Q. Do you speak Spanish?

A. Yes, I do.

Q. For how long have you spoken Spanish?

A. For about eight years.

Q. Did you encounter the defendant on June 1st of 2003?

A. Yes, I did.

Q. And how so?

A. He was referred to the CBP office.

Q. What is that?

A. That is the Customs and Border Protection office.

Q. And what were your duties that day?

A. Secondary officer.

Q. And what does a secondary officer do?

A. We handle mostly the case work that is brought before us.

Q. And what is some of that work?

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A. People who have violated the INA. For example, false claims, false documents, claiming to be U.S. citizens.

Q. Did you have an opportunity to interview the defendant on that day?

A. Yes, I did.

Q. Did he answer any of your questions?

A. He—he refused to answer any of my questions when it came to the sworn statement, but he did answer my questions when it came to the back page of the IA-67 A and B.

Q. What is that form that you're referring to?

A. That is a sworn statement.

Q. And did the defendant answer your question as to where he was going?

A. Yes, he did.

Q. And where did he say he was going?

A. He said he was going to Phoenix, Arizona to visit his children.

Q. And do you recognize anyone in the courtroom here today that you interviewed on that date?

A. Yes, I do.

Q. Who is that?

A. The gentleman sitting over there to the right.

Q. And is that the defendant that you interviewed that day?

A. That is the man.

MS. LOGAN: Thank you, Your Honor.

* * * * *

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MS. LOGAN: The Government calls Anthony Consolino.

THE CLERK: Please raise your right hand.

(ANTHONY CONSOLINO, GOVERNMENT WITNESS, SWORN)

THE CLERK: And your name, please, for the record.

THE WITNESS: Anthony Consolino.

THE CLERK: Could you spell that, please?

THE WITNESS: C-O-N-S-O-L-I-N-O.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Where do you work?

A. I work in Phoenix, Arizona.

Q. And who do you work for?

A. I work for the U.S. Immigration and Customs Enforcement.

Q. And what are some of your duties there?

A. I am a Special Agent, and I conduct investigations of Immigration violations.

Q. Do you speak Spanish?

A. I do speak Spanish, but I am not a native speaker.

Q. How did you learn to speak Spanish?

A. I learned through listening to radio and in school, and just casual conversation.

Q. Did you interview the defendant on October 15th of 2002?

A. I did.

Q. And did you interview him in Spanish?

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A. I don't remember if it was in Spanish or English.

Q. If the defendant spoke Spanish, would it have been in Spanish?

A. It would have been.

Q. And who else was present at the interview?

A. At the interview there was another witness that was present.

Q. And who was that person?

A. That was—judging from the signature, it looks like Special Agent David Scanlon.

Q. And as part of your duties do you commonly speak to and interview people in Spanish?

A. Usually I do.

Q. And how long have you been doing these interviews in Spanish?

A. For the better of three years.

Q. And did you eventually type up an affidavit for the defendant?

A. I did.

Q. Is that Exhibit 7 in front of you?

A. It is.

Q. And is that the type of affidavit?

A. That is the affidavit; correct.

Q. And do you recognize it?

A. I do.

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Q. How do you recognize it?

A. I recognize it because my signature is on it.

Q. And is that a true and correct copy of the original?

A. It appears to be.

Q. What is the date on that exhibit?

A. The date is October 15th, 2002.

Q. And what is the name of the person being interviewed on that exhibit?

A. The name is Juan Resendiz-Ponce.

MS. LOGAN: Your Honor, the Government moves to admit Exhibit 7 into evidence.

MS. BAGGOT: Your Honor, the defendant objects for the reasons previously stated.

THE COURT: Exhibit 7 is admitted. The objection is overruled.

Q. BY MS. LOGAN: Do you check the defendant's identification prior to the interview and the signature on the affidavit?

A. Normally that's the case.

Q. So you confirm that this is the person you're being interviewed—that's being interviewed, and you also watch him signing that affidavit?

A. That's correct.

Q. Now let's look at Exhibit 7. The defendant—did the defendant sign the document?

A. He did.

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Q. And you said there was a witness to the signing of the document?

A. That's correct.

Q. Is that person another agent?

A. He is.

Q. And what did the defendant say with regard to his name? What does the exhibit say with regard to his name?

A. With regard to his name, it states that he is a native and citizen of Mexico.

Q. What is his name?

A. Is name is Juan Resendiz-Ponce.

Q. And where was he born?

A. In the country of Mexico.

Q. And when was that?

A. That was on August 21st, 1971.

Q. And is there an alien number on that document?

A. Yes, there is.

Q. And what is the alien number?

A. The alien number is A73-934-853.

MS. LOGAN: Thank you. No further questions.

CROSS-EXAMINATION

BY MR. BAGGOT:

Q. Agent, prior to eliciting the statement from the defendant, did you give him the Miranda warnings?

A. No, I did not.

* * * * *

[133]

MS. LOGAN: Government calls Miguel Rodriguez. Would you please approach the witness stand?

THE CLERK: Please raise your right hand.

(MIGUEL RODRIGUEZ, GOVERNMENT WITNESS, SWORN)

THE CLERK: Would you please state your name for the record and spell your last name?

THE WITNESS: Miguel Rodriguez, R-O-D-R-I-G-U-E-Z.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MS. LOGAN:

Q. Agent Rodriguez, where do you work?

A. At the Florence Immigration Facility.

Q. And who do you work for?

A. Immigration and Customs.

Q. And how long have you worked for them?

A. Just over eight years.

Q. And what are your duties with the INS?

A. Custody and control of aliens in the Immigration custody, transportation duties, just general care.

Q. On October 15, 2002, did you encounter the defendant?

A. Yes, ma'am.

Q. And how did you encounter the defendant?

A. I was assigned to transportation duties that day, and I encountered him at the Florence detention facility. I was assigned to transport the alien.

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Q. And what happens at a border when you execute a Warrant of Deportation?

A. Upon arrival to the border I witness all the aliens cross the border.

Q. Do you confirm the warrants that you have, the names of the warrants to the people being deported?

A. Yes, ma'am.

Q. And how do you do that?

A. We take roll call several times before we leave the facility, and after the aliens are boarded on the bus.

Q. And did you record in writing that you witnessed the defendant going across the border from the United States into Mexico?

A. Yes, ma'am.

Q. And how is this information recorded?

A. It's on the departure witness on the I-205.

Q. Could you look at Exhibit 4, please?

MS. LOGAN: Could the witness have Exhibit 4?

Q. BY MS. LOGAN: Do you recognize that?

A. Yes ma'am.

Q. And how do you recognize it?

A. It's the I-205 Warrant of Removal, deportation.

Q. How do you recognize it?

A. By reading it.

Q. Does it have your signature on it?

[135]

A. Yes, it does, ma'am.

Q. And is there also a picture on that document?

A. Yes, ma'am.

Q. And who is the picture of?

A. Mr. Resendiz-Ponce.

Q. And did you—you said you signed that document; right?

A. Yes ma'am.

Q. Prior to signing that document, did you verify that the photo matched the person being deported?

A. Yes, ma'am, several times.

Q. And is there any way for a person to escape prior to walking across the border?

A. No, ma'am.

Q. And when you signed that warrant, does that mean you watched them walk across the border?

A. Yes. I signed the warrant after the departure is witnessed.

Q. And how does it say that the person who is deported got across the border.

A. Afoot.

Q. And that means?

A. That means he walked across the border.

Q. According to Exhibit 4, when was Mr. Resendiz-Ponce deported?

A. October 15th, 2002.

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Q. And where was he deported to?

A. To Mexico.

Q. And is there an alien number on that document?

A. Yes, ma'am.

Q. What is the alien number?

A. A73-934-853.

MS. LOGAN: Thank you. No further questions. Your Honor.

CROSS-EXAMINATION

BY MR. BAGGOT:

Q. Mr. Rodriguez, you stated you transported the defendant. How did you do that?

A. In a bus.

Q. And how—what size bus is this?

A. It's a MCI bus. It's about 49 seats capacity.

Q. And was the bus full on this day, October 15th?

A. I can't recall.

Q. How often do you drive the bus down there?

A. Five times a week.

Q. Is it normally full or close to full?

A. Just depends. Sometimes it is, sometimes, just depends.

Q. Do you remember Mr. Resendiz-Ponce personally or just because you signed this document, the I-205?

A. I just remember signing this document, because that's my signature. I don't remember him personally.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, DEFENDANT

Dec. 3, 2003
9:31 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
VOLUME 2

BEFORE: THE HONORABLE EARL H. CARROLL, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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* * * * *

[171] that it's—when you come to the port of entry and claim to be a United States citizen, you're attempting to reenter the United States, and what flows from that.

So the motion is denied.

Anything else? That's it?

All right. Now, is—do you have any witnesses, Mr. Baggot?

(Discussion off the record between Mr. Baggot and the defendant)

MR. BAGGOT: No, the defendant will exercise his right to remain silent.

THE COURT: All right. Very well then. When the jury is back in, we will—the Government will rest—or has rested. I will ask you, Mr. Baggot, you can say no witnesses. And then we will give the jury a coffee break while we discuss the instructions.

And I will need to have one instruction changed as well, the fact that—well, I think the set I did provide said the defendant didn't testify.

So in any event, we'll review the instructions with the defendant present. And so we will get the jury back in now for these purposes, and then go ahead.

(Jury in at 10:51 a.m.)

THE COURT: Very well. The Government having rested, Mr. Baggot, any witnesses?

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MR. BAGGOT: The defense will rest also, Your Honor.

THE COURT: All right. Very well.

Members of the jury, this an up and down morning for you. I now need to talk with the lawyers about the instructions. I have prepared instructions, have given then to the lawyers, and so they have a chance to comment or object to them. And I need to have them in a form—in a final form, because the next part of the case would be—will be, when you're back again, that I have to read the instructions to you before the final arguments of counsel. And so that requires that I have them—give the lawyers a chance to object to them.

And so we will do that. It's ten minutes of 11:00, and so we will take a recess until a quarter after 11:00. It will take me about five minutes—well, ten minutes, I suppose, to read the instructions to you then. And I'm sure we will then proceed at least with the Government's opening final argument before the lunch break.

So again now, don't talk about the case or discuss it or worry about the problems that we have sometimes in utilizing you, as I said, most effectively.

So we'll take a recess now so I can meet with the lawyers about the instructions. Please be back in the jury room at a quarter after 11:00, and we will go ahead, as I've said, at that time.

* * * * *

[187] doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence you are not convinced beyond a reason-

able doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

The defendant is charged with attempted reentry as a deported alien, in violation of Section 1326(a) of Title 8 of the United State Code. In order for the defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, the defendant is an alien;

Second, the defendant was reported—deported, removed f om the United States on or about October 15, 2002, at or near Nogales, Arizona;

Third, the defendant thereafter attempted to enter the United States in the District of Arizona at or near San Luis, Arizona on or about June 1, 2003, but intentionally committing an overt act that was a substantial step towards [188] reentering the United States;

Fourth, the defendant had not obtained the express consent of the Secretary of Homeland Security to reapply for admission.

An alien is a person who is not a natural born or naturalized citizen of the United States.

An act is done intentionally if a defendant is aware of the act and does not act through ignorance, mistake or intent. You may consider the evidence of a defendant's words, acts or omissions, along with all the other evidence, in deciding whether the defendant acted intentionally.

Intent ordinarily need not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from the surrounding circumstances.

Those are the instructions that I have for you now. I'll have a few additional instructions to read to you after the final arguments.

The Government having the burden of proof in the case, makes an opening final argument. Defense counsel has the opportunity to make a final argument, and then the Government can make a rebuttal or closing argument.

Miss Logan.

MS. LOGAN: The evidence in this case is straightforward and clear. On June 1st, 2003, the defendant [189] intentionally attempted to enter the United States after having been previously deported, and after having not received permission to reeenter the United States.

The elements are found on the instruction number 12, which I will read a portion of.

The defendant is an alien. The defendant was deported from the United States on October 15th, 2002, at or near Nogales, Arizona. The defendant thereafter attempted to enter the United States in the District of Arizona at or near San Luis, Arizona on or about June 1st, 2003, by intentionally committing an overt act that was a substantial step towards reentering the United States.

And finally, the defendant had not obtained the express consent of the Secretary of the Department

of Homeland Security to reapply for admission into the United States.

The evidence supports all four elements in this case.

The first element that the defendant is an alien. You will read the sworn testimony given by the defendant at his deportation hearing whereby the defendant stated that he is a Mexican citizen. You also heard an agent testify and read from that transcript earlier.

You will also have an opportunity to look at a sworn statement given by the defendant to Agent Consolino in this case on October 15, 2002, where the defendant admitted he was born in Mexico, and that he was a Mexican citizen.

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You will also have an opportunity to review the Order of Deportation by an Immigration Judge finding that the defendant needed to be deported to Mexico.

The second element, that the defendant was deported from the United States on October 15th, 2002, at or near Nogales, Arizona. You will have an opportunity to see a Warrant of Removal and Deportation, which has a picture of the defendant and his fingerprint on it, wherein the defendant was deported through Nogales, Arizona.

You also heard the testimony of Agent Rodriguez, who witnessed the defendant crossing the border from the United States into Mexico, and that he signed—Agent Rodriguez signed the warrant to show that the defendant had crossed from the United States into Mexico at Nogales.

And finally, you will also have an opportunity to read the warning given to the alien when he was removed and deported, which was signed by the defendant, and has his fingerprint on it, on October 15th 2002. That is Exhibit 5. In it it says that, in accordance with the provisions of Section 212(a)(9) of the Immigration and Nationality Act you are prohibited from entering, attempting to enter, or being in the United States for a period of 20 years from the date of your departure from the United States because, after having been previously excluded, deported or removed from the United States you have been found to have reentered the United States [191] illegally and have had the prior order reinstated under Section 241(a)(5) of the Act. That is dated October 15, 2002.

The evidence of the defendant attempted to enter the United States at San Luis on June 1st of 2003. You heard the testimony of Agent Vela who said the defendant approached her at the port of entry in San Luis, Arizona. That port of entry is 100 feet within the United States border. She said that the defendant presented her with two false identifications and told her that he was going to Calexico, which is one hour away from San Luis in the United States.

You also heard the testimony of Agent Bly. Agent Bly told you that he interviewed the defendant, and the defendant told him that he was on his way to Phoenix, Arizona.

You also heard the testimony of Agent Laskey, who took the fingerprints of the defendant while he was in secondary inspection at the San Luis port of entry.

And finally, the element that the defendant did not receive permission to reenter the United States.

You will see a certification of nonexistence of record. What that means is that there was an INS employee who searched all the records, including computerized records, and found that the defendant did not reapply—did not apply—did not receive permission to reapply into the United States.

You also heard the testimony of Agent Martin, who had the official A-file of the defendant with him. The official [192] A-file contains all documents of all contacts that the defendant had with Immigration Services regarding Immigration matters. And the agent testified that there is no such record of any application to reapply for entry into the United States.

You also heard from two experts. The fingerprint expert testified that the fingerprint card taken during the defendant's detention on June 1st, 2003, which has a picture of the defendant on it, matches the fingerprints taken during his deportation on October 15, 2002, on the Warrant of Removal, as well as the warning that was given to the defendant during that prior removal, which also has his signature on it.

The handwriting expert testified that the sworn statement that was taken from—taken by Agent Consolino of the defendant where he admits his Mexican citizenship, the signature of that document matches the document—the warning given to the alien during his prior deportation, which also has his fingerprint on it.

The evidence in this case is clear, the defendant, a Mexican citizen, intentionally attempted to enter the United States near San Luis, Arizona on June 1st, 2003. The defendant approached the San Luis port of entry. When he reached the turnstile he presented a false document, a permanent resident alien card, to Agent

Vela. Agent Vela said [193] that the photograph on the card was not him and asked for another form of identification. He presented a driver's license, which also did not contain a photo of the defendant on the driver's license. And also both of those identifications had the name Antonio Resendiz, which is not the name of the defendant in this case.

He was then escorted to secondary where he was further processed.

At the point when the defendant reached the turnstile of the port of entry he was 100 feet into the United States. This and the fact that he tried to enter with two false forms of identification is clear evidence that the defendant took a substantial step towards reentering the United States.

Also, the defendant told two separate agents that he was intending to go further into the United States. He told Agent Vela that he was going to Calexico. He told Agent Bly that he was going to Phoenix. By his own admission the defendant intended to enter the United States and go further than the San Luis port of entry.

And certainly the defendant did not obtain permission from the Secretary of the Department of Homeland Security to reapply for admission into the United States.

For the above reasons, the Government urges you to find this defendant guilty as charged.

THE COURT: Thank you very much.

[194]

Mr. Baggot.

MR. BAGGOT: Ladies and gentlemen, thank you for your attention and service in this case.

The Judge has just instructed you on several matters, one of which is that you must decide the case solely on the evidence before you. He's also instructed that you may draw reasonable inferences from the evidence before you, and that circumstantial evidence counts just as well as direct evidence.

However, one thing you should not do is guess. Or if there is something that was not presented, you shouldn't just suppose that it exists even though it was not presented. In effect, what you must do is evaluate the evidence in this case and see if the Government has provided evidence on each and every one of the elements which they have the constitutional duty to supply to you.

I'd like to discuss some of those elements right now.

First of all, one of the elements is that the defendant is an alien. The instructions go on to say that an alien is a person who is not a natural born or naturalized citizen of the United States.

The best the Government has shown in this case is that he was a citizen of Mexico. The Court has admitted a statement by the defendant from last year, October of last year, in which he stated that he was a citizen of Mexico.

[195]

That does not necessarily mean that he's not also a citizen of the United States. We submit that there is a deficiency in the evidence. The Government has not

discussed whether or not this individual is a United States citizen.

Is there any possibility of that? Well, he did present a valid green card with his name on it. The name—you will have the opportunity to review the evidence. You will see the name is not Juan, it is Antonio. But he did have a valid card. And he did present a valid driver's license, even though, again, his name was on it, but the first name was different.

If you read the transcript of the proceedings before the Immigration Judge back in 1996, you will see that he's been here since 1988, and that he is eligible for various forms of relief in the Immigration process. The Government has not negated or presented evidence to you he is not a citizen, and therefore that he is an alien.

Another element which the Government has not shown you is that this is what is meant by an intentional attempt. The Judge provides a definition of intentional, meaning that if the defendant is aware of the act and does not act through ignorance, mistake or accident. Well, obviously the Government never did address the situation of whether this was a mistake or not. All we know is that he presented a valid LPR card, legal permanent resident card, which is known as a [196] green card. And number two, a valid driver's license. His name was on both of those. We don't know where they came from. We don't know where—how he got those.

We don't know what his state of mind was. The Government never did address the question of whether or not this was a mistake or ignorance or an accident. Perhaps he picked up the wrong card on the way out of the house or whatever happened. I don't know. We

don't know. That wasn't presented to you. That is a glaring deficiency in the evidence.

And of course the jury's job is not to decide what really happened. That's the agent's job. But to decide whether the evidence presented supports the charge as you're given to it.

We submit the Government never did address the subject of ignorance, mistake or accident, how he got the card, what his state of mind was, anything of that nature.

There's also a question in this case of whether he attempted to enter. As you recall, the first agent said that as soon as she looked at his green card—actually it wasn't his, at the green card, she knew at that point in time that there was—something was amiss, simply because the picture on the card doesn't match what he looks like. At that point in time he didn't attempt to enter, he didn't attempt to do anything. He told the agent where he was going. He told one [197] agent Phoenix, the other agent Calexico. But he never did attempt to deceive them.

When he was told that the card wasn't good, he didn't attempt to enter at all, he just accepted—he answered the questions truthfully where he was going and he didn't attempt to enter.

Also, the word "deportation" is not defined by the Court. The word "deportation" is something that is a matter of fact, it's an element of this case. You will have to determine whether there was an actual deportation or not in this case.

And bear in mind, one of the last instructions I think the Judge will give you, is that is you wish to communicate you may send a letter to the Judge and he

will meet with us and you will get an answer. I don't know how edifying the answer will be, but you will get an answer. So you have that option to you.

If you read the transcript of what happened in the agency when he was before the Immigration Judge, there are various possibilities. And that is on page 4 of the transcript. It is possible there could be a suspension of it, an asylum application, a volunteer departure. The Government did not negate or explain to you what happened, whether any of those possibilities occurred.

So as you go through this case, please bear in mind [198] that your duty as jurors is to see if the Government has produced evidence to support its charge.

We submit, for the reasons that I've just explained to you, there are holes in the evidence, they have not sustained their burden of proof beyond a reasonable doubt, and you should find the defendant not guilty.

Again, thank you for your service. I'm sure you all had other things to do yesterday and today. Of course the judge did, I did, and everybody else did. So thank you for your service.

THE COURT: Miss Logan.

MS. LOGAN: The identification cards presented at the port of entry were not the defendant's. The picture does not match the defendant. The name on those cards are Antonio Resendiz, which is an alias. The defendant, when he was asked while his fingerprints were being taken what his name was, his name is Juan Resendiz-Ponce. Those I.D. cards were not his. They were not valid. And there is no way to say that he is a U.S. citizen because he was carrying those cards. They belong to someone else.

And the fact that he was at the port of entry, that he was within the United States, 100 feet, that is an attempted entry, because he was within the United States already.

The elements are clear. The evidence is clear. You [199] should find the defendant guilty beyond a reasonable doubt.

Thank you.

THE COURT: All right. Just a few additional instructions, members of the jury.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you've considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Your verdict must be based solely on the evidence and on the law as I've given it to you in these

in instructions. However, nothing that I've said or done is intended to suggest

* * * * *

[EXHIBIT 1]

CASE NO. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA

VS. JUAN RESENDIZ-PONCE

PLAINTIFF'S EXHIBIT 1

DATE _____ IDEN.

DATE _____ EVID.

BY _____
Deputy Clerk

AO 386

BEST AVAILABLE COPY

PERMANENT RESIDENT CARD

NAME RESENDEZ, ANTONIO

INS A# [Redacted]

Birthdate Category Sex

[Redacted] W16 M

Country of Birth

Mexico

CARD EXPIRES 12/19/08

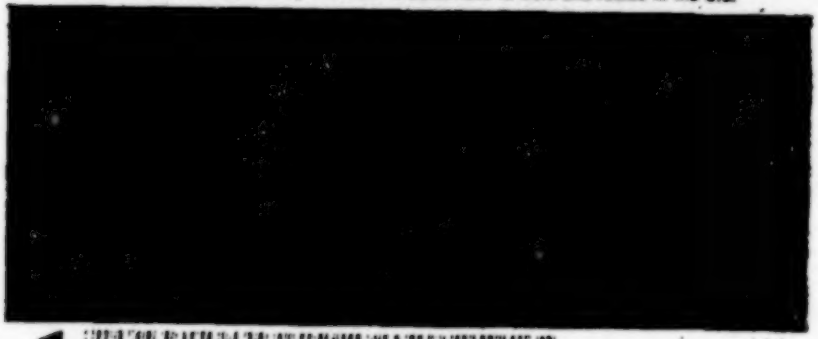
Resident Since 01/26/91

C1USA091263504 9WAC9816652823<<
6705215M0812191MEX<<<<<<<<<<<9
RESENDEZ<<ANTONIO<<<<<<<<<<<<<

U.S. DEPARTMENT OF JUSTICE Immigration and Naturalization Service

PERMANENT RESIDENT CARD

The person identified by this card is authorized to work and reside in the U.S.



[EXHIBIT 2]

CASE NO. CR 03-810-PHX-EHC

UNITED STATES OF AMERICA

VS. JUAN RESENDIZ-PONCE

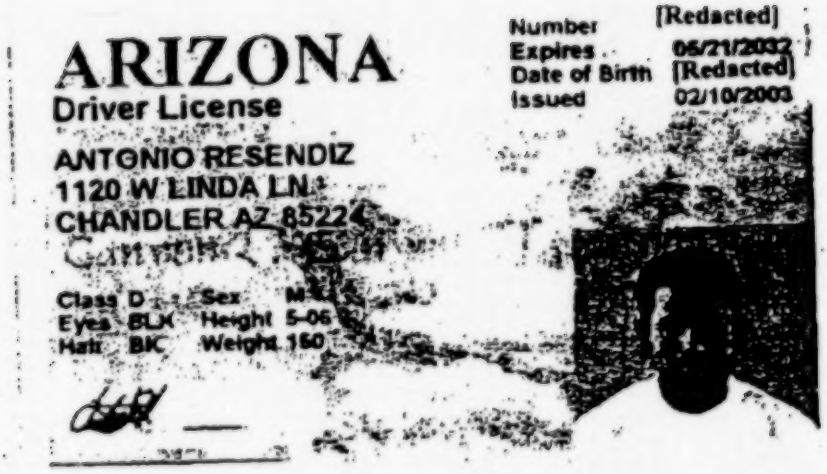
PLAINTIFF'S EXHIBIT 2

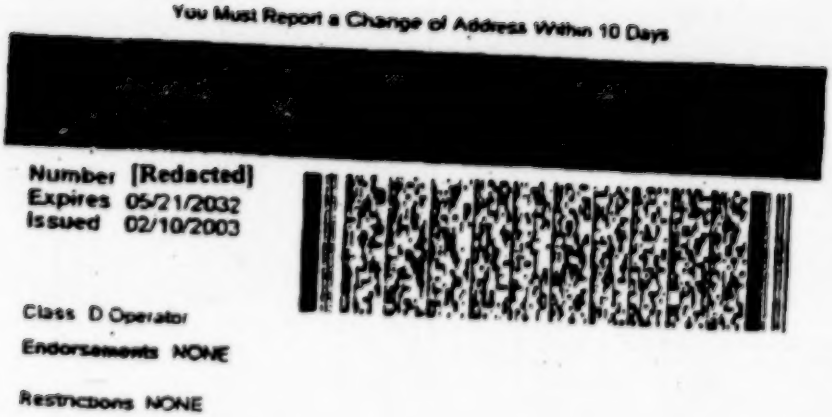
DATE _____ IDEN.

DATE _____ EVID.

BY _____
Deputy Clerk

AO 386


ARIZONA
Driver License
ANTONIO RESENDIZ
1120 W LINDA LN
CHANDLER AZ 85224
Class D Sex M
Eyes BLK Height 5-06
Hair BIK Weight 160
Number [Redacted]
Expires 05/21/2032
Date of Birth [Redacted]
Issued 02/10/2003


You Must Report a Change of Address Within 10 Days
[redacted]
Number [Redacted]
Expires 05/21/2032
Issued 02/10/2003
Class D Operator
Endorsements NONE
Restrictions NONE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 03-00810-001-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

v.

JUAN RESENDIZ-PONCE, DEFENDANT

[May 25, 2004]

JUDGMENT IN A CRIMINAL CASE

USM#: 61830-208 ICE#: A73934853

THERE WAS A verdict of guilty as to Count I of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE: violating Title 8, USC § 1326(a), Illegal Re-entry after Deportation, a Class D Felony offense, as charged in Count I of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **SIXTY THREE (63) MONTHS** on Count I. Upon release from imprisonment the defendant shall be placed on supervised release for a term of **THIRTY SIX (36)** months on Count I. The Court recommends that the defendant be placed in an institution in the southwestern part of the United States where there are education programs and vocational training available for his participation.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk, U.S. District Court, Attn: Finance, Suite 130, 401 West Washington St., SPC 1, Phoenix, AZ 85003-2118, the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $100.00 **FINE:** $
RESTITUTION: $

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The total special assessment of $100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count I of the Indictment.

All monetary penalties are due immediately or in regular monthly installments. If incarcerated, payments shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Any unpaid balance shall become a condition of supervision and shall be paid within prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address.

The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **THIRTY SIX (36) MONTHS** on Count I.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. Pursuant to 18 U.S.C. § 3563(a)(5)

and 3583(d) the defendant shall submit to one drug test within 15 days of release from imprisonment and such other periodic drug tests thereafter, as directed from time to time by the probation officer.

The defendant shall not possess a firearm, ammunition or other dangerous weapon as defined in 18 U.S.C. § 921.

The defendant shall comply with the standard conditions of supervision adopted by this Court in General Order 99-9:

1) You shall not commit another federal, state, or local crime during the term of supervision.

2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.

3) You shall report to the Probation Office as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.

4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5) You shall support your dependents and meet other family responsibilities.

6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) You shall notify the probation officer at least ten days prior to any change of residence or employment.

8) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. Possession of controlled substances will result in mandatory revocation of your term of supervision. If ordered by the Court to participate in a drug and/or alcohol abuse treatment program, you shall totally abstain from the use of any alcoholic beverages or other intoxicants during and after the course of your treatment.

9) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.

10) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

11) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

12) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.

13) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

14) As directed by the probation officer, you shall notify third parties of risks that may be occasioned

by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

15) You shall refrain from possessing a firearm, destructive device, or other dangerous weapon. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases unless special condition imposed by Court.

16) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and at least two periodic substance abuse tests thereafter, pursuant to 18 U.S.C. §§ 3653(a)(5) and 3583(d);

17) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.

18) The balance of any financial obligation ordered by this Court shall be paid in regular monthly installments approved by the probation officer, the full amount to be paid 90 days prior to expiration of supervision. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse

treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL WITHIN 10 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons and recommends: the defendant be placed in an institution in the southwestern part of the United States where there are education programs and vocational training available for his participation.

Date of Imposition of Sentence: **Monday, May 24, 2004**

/s/ EARL H. CARROLL Date 5-25-04
EARL H. CARROLL, United States District Judge

Return

I have executed this judgment as follows: _____

Defendant delivered on _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

_____ By: _____

United States Marshal Deputy Marshal